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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 61

E. S. EVANS, *et al.*,

Petitioners,

—v.—

CHARLES E. NEWTON, *et al.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
FRANK H. HEFFRON
10 Columbus Circle
New York, New York 10019

DONALD L. HOLLOWELL
WILLIAM H. ALEXANDER
HOWARD MOORE, JR.
859½ Hunter Street, N. W.
Atlanta, Georgia 30314

Attorneys for Petitioners

INDEX

	PAGE
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutory and Constitutional Provisions Involved	3
Statement	5
How the Federal Questions Were Raised and Decided Below	9
Reasons for Granting the Writ	12
I. This Case Involves Enforcement by the State of Racial Discrimination in Violation of the Fourteenth Amendment	12
II. The State of Georgia and the City of Macon Are So Involved in the Operation of Baconsfield as to Invalidate Under the Fourteenth Amendment Any Enforcement of the Racially Discriminatory Terms of Senator Bacon's Will	17
Conclusion	25
Appendix	1a
Opinion of Supreme Court of Georgia	1a
Judgment of Supreme Court of Georgia	10a
Order of Supreme Court of Georgia Denying Rehearing	10a

PAGE

Letter Opinion of Superior Court of Bibb County .. 11a

Order of Superior Court of Bibb County 13a

TABLE OF CASES

Adams v. Bass, 18 Ga. 130 (1855) 19

American Colonization Society v. Gartrell, 23 Ga. 448 (1858) 19

Beckwith v. Rector, etc., of St. Philip's Parish, 69 Ga. 564 (1882) 21

Burton v. Wilmington Parking Authority, 365 U. S. 715 ..... 17, 20

Charlotte Park and Recreation Comm'n v. Barringer, 242 N. C. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983 14

Cox v. De Jarnette, 104 Ga. App. 664, 123 S. E. 2d 16 (1961) 22

Creech v. Scottish Rite Hosp. for Crippled Children, 211 Ga. 195, 84 S. E. 2d 563 (1954) 16

Eaton v. Grubbs, 329 F. 2d 710 (4th Cir. 1964) 21, 24

Emory University v. Nash, 218 Ga. 317, 127 S. E. 2d 798 (1962) 21

Estate of Stephen Girard, 391 Pa. 434, 138 A. 2d 844 (1958) 11, 15

Goree v. Georgia Industrial Home, 187 Ga. 368, 200 S. E. 684 (1938) 21

Guillory v. Administrators of Tulane University, 212 F. Supp. 674 (E. D. La. 1962) 16

Holmes v. City of Atlanta, 350 U. S. 879 12

PAGE

Jones v. City of Atlanta, 35 App. 376, 133 S. E. 521 (Ga. Ct. App. 1926) 23

Leeper v. Charlotte Park and Recreation Comm'n, 2 Race Rel. L. Rep. 411 (Super. Ct. Mecklenburg County 1957) 14
Lombard v. Louisiana, 373 U. S. 267 .....15, 16, 17

Marsh v. Alabama, 326 U. S. 501 24
Morehouse College v. Russell, 219 Ga. 717, 135 S. E. 2d 432 (1964) 22
Morehouse College v. Russell, 109 Ga. App. 301, 136 S. E. 2d 179 (1964) 22
Morton v. Savannah Hospital, 148 Ga. 438, 96 S. E. 887 (1918) 22
Muir v. Louisville Park Theatrical Ass'n, 347 U. S. 971 12
Murphy v. Johnston, 190 Ga. 23, 8 S. E. 2d 23 (1940) .. 23

Pace v. Dukes, 205 Ga. 835, 55 S. E. 2d 367 (1949) 23
Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 353 U. S. 230 .....11, 12, 13, 14, 15, 17
Pennsylvania v. Board of Directors of City Trusts of the City of Philadelphia, 357 U. S. 570 .....11, 15
Peterson v. City of Greenville, 373 U. S. 244 .....15, 16, 17, 19, 20

Regents of University System v. Trust Company of Georgia, 186 Ga. 498, 198 S. E. 345 (1938) 23
Rice University v. Carr, 9 Race Rel. L. Rep. 613 (D. C. Harris County, Tex. 1964), appeal dismissed, No. 14,472, Tex. Ct. Civ. App., February 4, 1965 16
Robinson v. Florida, 378 U. S. 153 .....11, 16, 17, 19

PAGE

Shelley v. Kraemer, 334 U. S. 1 ..... 14, 15
Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 929 (4th Cir. 1963), cert. denied, 376 U. S. 938 24
Simpson v. Anderson, 220 Ga. 155, 137 S. E. 2d 638 (1964) 21
Smith v. Allright, 321 U. S. 649 24
Stubbs v. City of Macon, 78 Ga. App. 237, 50 S. E. 2d 866 (1948) 22

Terry v. Adams, 345 U. S. 461 24
Turner v. City of Memphis, 369 U. S. 350 17

Watson v. City of Memphis, 373 U. S. 562 12

STATUTES

28 U. S. C. §1257(3) 2

Const. Ga. 1877, art. 7, sec. 2, par. 1, Ga. Code Ann. §2-5002 20

Const. Ga. 1945, art. 7, sec. 1, par. 4, Ga. Code Ann. §2-5404 ..... 3, 21

Ga. Code Ann. §69-301 22

Ga. Code Ann. §69-504 ..... 5, 9, 10, 11, 14, 18, 19, 21, 23

Ga. Code Ann. §69-505 20

Ga. Code Ann. §§69-601 through 69-616 24

Ga. Code Ann. §85-707 23

Ga. Code Ann. §92-201 ..... 4, 21

Ga. Code Ann. §108-201 21

PAGE

Ga. Code Ann. §108-202 ..... 10, 16, 22

Ga. Code Ann. §108-203 21

Ga. Code Ann. §108-204 22

Ga. Code Ann. §§108-206 through 108-209 22

Ga. Code Ann. §108-212 (1963 Supp.) 22

Pa. Stat. Ann., tit. 18, §4654 15

OTHER AUTHORITIES

American Bar Association, Canons of Professional Ethics, No. 10 16

Clark, Charitable Trusts, the Fourteenth Amendment, and the Will of Stephen Girard, 66 Yale L. J. 979 (1957) 24

Woodward, *The Strange Career of Jim Crow,* Ch. II (1957) 19

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Georgia in the case of *E. S. Evans, et al.* v. *Charles E. Newton, et al.*,* entered on September 28, 1964. Rehearing was denied on October 8, 1964. Mr. Justice Stewart, on December 22, 1964, granted an order extending the time for filing this petition for writ of certiorari to and including March 5, 1965.

Opinion Below

The opinion of the Supreme Court of Georgia (R. 132) is reported at 138 S. E. 2d 573 and is set forth in the appendix *infra*, p. 1a.

* Petitioners are E. S. Evans, Louis H. Wynn, J. L. Key, Booker W. Chambers, William Randall, and Van J. Malone. The respondents are all parties who were defendants in error in the Supreme Court of Georgia. See note 5 *infra*.

Jurisdiction

The judgment of the Supreme Court of Georgia in this case was entered on September 28, 1964 (R. 147). Rehearing was denied October 8, 1964 (R. 153). On December 22, 1964, Mr. Justice Stewart extended the time for filing the petition for writ of certiorari to and including March 5, 1965.

The jurisdiction of this Court is invoked pursuant to Title 28, U. S. C. §1257(3), petitioners having asserted below and asserting here deprivation of rights, privileges and immunities secured by the Constitution of the United States.

Questions Presented

1. Land was left in trust to the City of Macon, Georgia, for use as a public park for the exclusive use of white women and children; the city administered the park on a discriminatory basis through an appointed board of managers; after Negroes were allowed to use the park, the city and the board of managers petitioned a court of equity to appoint new trustees so that Negroes might be excluded from the park; the court appointed new trustees for that purpose. Is the state thereby enforcing racial discrimination contrary to the Fourteenth Amendment?

2. In the above circumstances a state statute authorized gifts of land in trust for the establishment of parks limited to white women and children; the state granted tax exemption to such trusts only if use of such parks were limited according to race; the state by law encouraged the establishment of charitable trusts to fulfill a public function of providing public recreational facilities; the state granted

limited liability in tort cases to such charitable institutions; the state granted them perpetual existence, unlike non-charitable trusts; and the City of Macon administered the park for years on a discriminatory basis. Has the state become involved in the operation of the park to such an extent as to require the applicability of the equal protection clause of the Fourteenth Amendment?

Statutory and Constitutional Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States.

This case also involves the following constitutional and statutory provisions of the State of Georgia:

Const. Ga. 1945, art. 7, sec. 1, par. 4, Ga. Code Ann. §2-5404:

> Exemptions from taxation.—The General Assembly may, by law, exempt from taxation all public property; places of religious worship or burial and all property owned by religious groups used only for residential purposes and from which no income is derived; all institutions of purely public charity; all intangible personal property owned by or irrevocably held in trust for the exclusive benefit of, religious, educational and charitable institutions, no part of the net profit from the operation of which can inure to the benefit of any private person; all buildings erected for and used as a college, incorporated academy or other seminary of learning, and also all funds or property held or used as endowment by such colleges, incorporated academies or seminaries of learning, provided the same is not invested in real estate; and provided, further, that said exemptions shall only apply to such colleges, incorpo-

rated academies or other seminaries of learning as are open to the general public; provided further, that all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people, shall be limited to colored people; . . .

Ga. Code Ann. §92-201:

Property exempt from taxation.—The following described property shall be exempt from taxation, to wit: All public property; places of religious worship or burial, and all property owned by religious groups used only for single family residences and from which no income is derived; all institutions of purely public charity; hospitals not operated for the purpose of private or corporate profit and income; all intangible personal property owned by or irrevocably held in trust for the exclusive benefit of, religious, educational and charitable institutions, no part of the net profit from the operation of which can inure to the benefit of any private person; all buildings erected for and used as a college, nonprofit hospital, incorporated academy or other seminary of learning, and also all funds or property held or used as endowment by such colleges; nonprofit hospitals, incorporated academies or seminaries of learning, providing the same is not invested in real estate; and provided, further, that said exemptions shall only apply to such colleges, nonprofit hospitals, incorporated academies or other seminaries of learning as are open to the general public: Provided, further, that all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people, shall be limited to colored people; . . .

Ga. Code Ann. §69-504:

> Gifts for public parks or pleasure grounds.—Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said divisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

Statement

This suit was commenced by some of the respondents to effect the banishment of Negroes from a public park established in Macon, Georgia under the will of Augustus Octavius Bacon, a United States senator from Georgia. The will of Senator Bacon (R. 19), executed on March 28, 1911,[1] provided in Item 9th for a gift of real property to the City of Macon as owner and trustee for the maintenance of a park for the white women and children[2] of the City of

[1] A codicil was added September 6, 1913 (R. 43).

[2] The Board of Managers was given discretion to open the park to white men and white non-residents of Macon (R. 31). This power was exercised (R. 15).

Macon, under the supervision of a Board of Managers appointed by the Mayor and Council (R. 27). The will set aside a separate fund in trust to defray expenses of administering the park (R. 34). The park, named Baconsfield, was operated in accordance with the racial limitation in Bacon's will until a short time before this suit was instituted, when Negroes were allowed to use the park (R. 15).

On May 4, 1963, Charles E. Newton and other members of the Board of Managers of Baconsfield[3] filed a petition in the Superior Court of Bibb County, Georgia, requesting the removal of the City of Macon as trustee, the appointment of new trustees, and the transfer of title in Baconsfield to newly appointed trustees. Named as defendants were the City of Macon and the trustees of certain residuary legatees of Bacon's estate, the Curry heirs.[4] This relief was sought explicitly for the purpose of enforcing the racially discriminatory terms of Bacon's will (R. 12-17).

The City of Macon filed its answer (R. 47) admitting most allegations of the petition, but stating that it had "no authority to enforce racially discriminatory restrictions with regard to property held in fee simple or as trustees for a private or public trust and, as a matter of law, is prohibited from enforcing such racially discriminatory restrictions" (R. 48). The defendant trustees for the Curry heirs filed their answer admitting all allegations of the petition and joining in "each and every prayer of said petition" (R. 51); they were represented by the same counsel as the plaintiff members of the Board of Managers (R.

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[3] The Board of Managers did not sue as an entity. Each member sued, through private counsel, in his capacity as member of the Board (R. 12).

[4] The trustees for the Curry heirs were Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee (R. 12).

17, 51). Plaintiffs filed a motion for summary judgment (R. 54).

On May 29, 1963, a diversity of interest appeared in this lawsuit for the first time when Rev. E. S. Evans and five other Negro citizens of the City of Macon, petitioners here, moved for leave to file a petition in intervention (R. 56). In their intervention petition of June 18, 1963, the Negro intervenors alleged that the appointment of new trustees of the park in order to comply with the racial limitation in Bacon's will would violate the Fourteenth Amendment (R. 61). The intervenors requested that the Superior Court "effectuate the general charitable purpose of the testator to establish and endow a public park within the City of Macon by refusing to appoint private persons as trustees" of the park (R. 62-63). Their petition also challenged the plaintiffs' standing to sue (R. 63).

On January 8, 1964, the plaintiff members of the Board of Managers filed an amendment to their original petition requesting that all Negroes be enjoined from using the park (R. 65). The amendment requested the addition as plaintiffs of four previously unrepresented residuary legatees under Bacon's will, the Sparks heirs (R. 66); a request was also made that the trustees of the Curry heirs, originally joined as defendants, be permitted to assert the interests of the Curry heirs as plaintiffs (R. 67). Simultaneously, the Sparks heirs intervened, asking that all relief requested by the original plaintiffs be granted (R. 69). Also at the same time, the trustees for the Curry heirs asked to be allowed to assert their interests as plaintiffs, and joined in all of the plaintiffs' prayers for relief (R. 72). In addition, the Sparks heirs and the trustees for the Curry heirs, all of whom were represented by counsel for the plaintiff Board members, asked for reversion of the trust property into Bacon's estate in the event that other relief were denied (R. 70, 74).

On February 5, 1964, the City of Macon, the only defendant making any pretense of defending the suit, amended its answer stating that the City had resigned as trustee of Baconsfield (R. 94) pursuant to resolution of the Mayor and Council on February 4, 1964 (R. 79), and requesting the court's acceptance of its resignation and the appointment of substitute trustees (R. 76).

On May 5, 1964, the Negro intervenors amended their petition, alleging that the Fourteenth Amendment would be violated if the relief sought by the other parties were granted (R. 95).

No evidentiary hearing was held. The Superior Court issued its decree on March 10, 1964, allowing intervention by all who had requested it, accepting the resignation of the City of Macon as trustee of Baconsfield, appointing three private individuals as new trustees, and retaining jurisdiction of the case (R. 99). No ruling was made on the requests that Negroes be enjoined from using the park. The conditional prayers for reversion of the trust property were deemed moot (R. 100).

Appeal was taken to the Supreme Court of Georgia by petitioners, the Negro intervenors.[5] On September 28, 1964, the Supreme Court of Georgia affirmed the judgment of

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[5] The defendants in error on the appeal were the City of Macon, the four Sparks heirs, the four trustees for the Curry heirs, and the three newly appointed trustees of the park. By amendment to the bill of exceptions, the original plaintiffs, the members of the Board of Managers of Baconsfield, were added as defendants in error on the appeal (R. 105, 110, 130). Subsequent to the decree of the Superior Court, all seven members of the Board of Managers of Baconsfield submitted their resignations to the three newly appointed trustees of the park (R. 115). The trustees then reappointed three of the members of the Board of Managers and substituted four new members of the Board (R. 116). All members of the Board of Managers, whether original appointees or new appointees, were made parties to the appeal (R. 131).

the Superior Court of Bibb County. A motion for rehearing was denied on October 8, 1964 (R. 153).

How the Federal Questions Were Raised and Decided Below

The federal constitutional issues, on which this case turned, were raised at the outset by the Negro intervenors, petitioners here, in their intervention petition (R. 59). There it was alleged that enforcement of the racial limitation in Bacon's will by a court of the State of Georgia "is violative of the Fourteenth Amendment to the United States Constitution" (R. 61). It was also alleged that "discrimination based solely upon race is no longer a permissible object of state action whether such action is that of an administrative agency, the state executive officers and employees, the state legislature, or the state courts" (R. 62). The intervenors requested that the Superior Court "effectuate the general charitable purpose of the testator" by refusing to appoint private trustees (R. 62-63).

Following the intervention of Bacon's heirs and the resignation of the City of Macon, the Negro intervenors amended their petition, alleging: 1) that the "equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits this Court from enjoining Negroes from use of the park", 2) that "the equal protection clause of the Fourteenth Amendment" prohibits acceptance of the City's resignation and the appointment of new trustees "for the purpose of enjoining [sic] [enforcing] the racially discriminatory provision in the will of A. O. Bacon," 3) that §69-504 of the Georgia Code[6] "prescribes racial discrimination and is therefore violative of

[6] Section 69-504 of the Georgia Code authorized gifts of property to municipalities for the operation of parks "for white women and children" and other racially designated classes, *supra*, p. 5.

the equal protection clause to the Fourteenth Amendment", and 4) that §108-202 of the Georgia Code (the cy pres provision) "properly construed, requires that the racially discriminatory provision in A. O. Bacon's will be declared null and void" (R. 95-96).

The order of the Superior Court of Bibb County rejected the constitutional claims of the Negro intervenors by implication (R. 99). Upon issuing its order and decree, Judge Long of the Superior Court wrote a letter to counsel for all parties stating that the "racial limitation in Senator A. O. Bacon's will is not unlawful for any reason as contended by the intervenors, Reverend E. S. Evans, et al." The letter also said that the appointment of new trustees was proper since the City of Macon, acting as trustee, could not "apply constitutionally the racial criterion prescribed by the testator." The doctrine of cy pres was held to be inapplicable to this trust. Appendix, *infra,* p. 11a.

On appeal the Supreme Court of Georgia affirmed the ruling of the Superior Court (R. 147), deciding all issues adversely to petitioners. In its opinion the Supreme Court of Georgia stated: "Counsel for the plaintiffs in error (the Negro intervenors) assert that the decree of the judge of the superior court was 'patent enforcement of racial discrimination contrary to the equal protection clause of the Fourteenth Amendment' to the Federal Constitution" (R. 141). The court rejected this contention. It also held that Ga. Code Ann. §69-504 did not require that Senator Bacon's gift to the City include a racial limitation and held that such a racial limitation was not invalid (R. 142-143). The Supreme Court of Georgia rejected petitioners' contention that the racial limitation should be stricken under the cy pres doctrine (R. 143-144). Finally, it held that the action of the Superior Court in accepting the City's resignation as trustee and appointing private

trustees was consistent with this Court's ruling in *Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia,* 353 U. S. 230, pointing out that the Supreme Court of Pennsylvania subsequently approved the appointment of private trustees for Girard College and this Court dismissed the appeal and denied certiorari, *Estate of Stephen Girard,* 391 Pa. 434, 138 A. 2d 844 (1958); *Pennsylvania* v. *Board of Directors of City Trusts of the City of Philadelphia,* 357 U. S. 570 (R. 144-146).

Petitioners moved for a rehearing, contending that Ga. Code Ann. §69-504, providing for gifts of real property to municipalities for the benefit of white persons or for the benefit of Negro persons, brought this case within the holding of this Court in *Robinson* v. *Florida,* 378 U. S. 153, which held that a state regulation requiring desegregated restaurants to provide racially separate rest-room facilities constituted state encouragement of segregation in violation of the Fourteenth Amendment (R. 149). The Supreme Court of Georgia denied rehearing without opinion (R. 153).

Reasons for Granting the Writ

The decision below conflicts with applicable decisions of this Court on important constitutional issues.

I.

This Case Involves Enforcement by the State of Racial Discrimination in Violation of the Fourteenth Amendment.

This is a classic case of state enforcement of racial discrimination by every branch of government, legislative, executive, administrative, and judicial. The responsibility of each branch is no less than in the many cases prohibiting discrimination in public recreational facilities, e.g., *Watson* v. *City of Memphis*, 373 U. S. 562; *Holmes* v. *City of Atlanta*, 350 U. S. 879; *Muir* v. *Louisville Park Theatrical Ass'n*, 347 U. S. 971.

The suit began when the members of the Board of Managers of Baconsfield, who had been enforcing racial discrimination for generations, sued for relief that would enable them to resume the practice. Under Bacon's will, the Board members were appointees of the Mayor and Council of Macon[7] with the sole function of administering the park owned in trust by the City (R. 31). They must be regarded as part of the administration of the City of Macon. See *Pennsylvania* v. *Board of Directors of City Trusts*, 353 U. S. 230.

Significantly, the Board of Managers did not sue as a collective entity, but each member sued individually in his capacity as a member of the Board. Presumably, if the

[7] All seven appointees must be white, at least four must be women, and one should be a descendant of Senator Bacon, if possible (R. 30, 31).

Board had sued as a body, it would have been entitled, as a municipal agency, to representation by the City Attorney. Since the principal defendant was the City of Macon, the nonadversary, sham nature of the suit would have been exposed from the beginning if this had occurred. In any event, the Board members suing individually were treated as competent parties.

The involvement of the executive and legislative branches of City government is evident also. In the first instance, the City failed to exercise its control over its own litigation by preventing the suit altogether. As defendant, the City put up the weakest kind of defense. It did not even suggest to the Superior Court that the Board members, suing individually, lacked the capacity to represent an agency of the City (R. 47). At no time did the City raise any objections, constitutional or otherwise, to the transfer of its public park to other trustees (R. 49). Eventually, the City, acting through its Mayor and Council, caved in completely, voluntarily submitting its resignation (R. 94), and joining in the plaintiffs' request that the new trustees be appointed so that Negroes could be excluded again from Baconsfield (R. 76).

Undoubtedly the City could have prevented the result brought about by this suit. Several municipalities have received gifts from private donors mandating racial discrimination in the use of the property transferred. Faced with the conflict between the terms of the gift and the requirements of the Constitution, they have continued to use donated resources and ignored governmentally unenforceable limitations rather than devise schemes for private discriminatory operation.[8] In the *Girard College Case,* where

[8] The City of Charlotte purchased the reversionary interest from the heirs of a testator who required racial discrimination, so that the City could continue to provide recreational facilities for its

the Board of Directors of City Trusts was a statutory body with independent power to sue, the City of Philadelphia and the State of Pennsylvania entered the suit through their official counsel, respectively, on the side of the Fourteenth Amendment, 353 U. S. 230. By contrast, the Mayor and the Council of the City of Macon bear direct, if not primary, responsibility for the racial discrimination brought about by this suit.

The responsibility of Georgia's judiciary is apparent on the surface. Two of Georgia's courts held that the discriminatory terms of a private instrument must be given effect, despite the Fourteenth Amendment, to insure the exclusion of Negroes from a place of public accommodation. It is submitted that this result was foreclosed by *Shelley* v. *Kraemer*, 334 U. S. 1.

In many ways, state involvement was less clear in *Shelley* than here. In *Shelley*, the instrument containing the discriminatory clause was an agreement between private parties, in which the state had no part. The lawsuit in *Shelley* represented a genuine controversy between private parties—Negroes who wanted to maintain their home and other home owners who wanted to secure the exclusion of Negroes from the neighborhood, a putative right obtained in the bargaining process. Finally, the subject of the lawsuit in *Shelley* was a private home, rather than a place of public accommodation.

In this case, the racial limitation was encouraged by, imposed upon, and accepted by the state. Section 69-504 of the Georgia Code invited Senator Bacon to restrict use

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citizens, *Leeper* v. *Charlotte Park and Recreation Comm'n*, 2 Race Rel. L. Rep. 411 (Super. Ct. Mecklenburg County 1957), even though the racial limitation had been held valid, *Charlotte Park and Recreation Comm'n* v. *Barringer*, 242 N. C. 311, 88 S. E. 2d 114 (1955), cert. denied, 350 U. S. 983.

of the park to the women and children of one race.[9] The limitation was accepted and enforced by the City and its agents for many years, including several years following this Court's decision in the *Girard College Case*. In the spring of 1963, a turning point for civil rights in this country, Negroes were allowed to use the recreational facilities of Baconsfield because the City recognized that overt enforcement of discrimination by the state would no longer be tolerated. But City officials promptly went to court and asked that private trustees be substituted so that discrimination could be reintroduced under private supervision.

Whether the original proponents be viewed as City agents or the City itself, it was an instrumentality of the state that sought judicial enforcement of discrimination in this case. Cf. *Lombard* v. *Louisiana*, 373 U. S. 267, where an official policy of segregation in restaurants was held to invalidate trespass convictions of Negroes who challenged that policy. It is of minor importance that the racial limitation on use of Baconsfield can be traced to an individual owner of private property. That was true in the first *Girard College Case*, 353 U. S. 230, where it was held that the policy could not be enforced by a state agency.[10] It was also true in *Shelley* v. *Kraemer*. Moreover, this Court held in *Peterson* v. *City of Greenville*, 373

[9] See pp. 18-20, *infra*.

[10] In the second *Girard College Case*, the Supreme Court of Pennsylvania approved the appointment of private trustees to continue discriminatory operation. *Estate of Stephen Girard*, 391 Pa. 434, 138 A. 2d 844 (1958), appeal dismissed and cert. denied, 357 U. S. 570. Petitioners challenge the correctness of the ruling of the Supreme Court of Pennsylvania. This Court's refusal to review may be read in the light of the possible availability of relief for the Negro plaintiffs in the courts of Pennsylvania under Pa. Stat. Ann., tit. 18, §4654, forbidding racial discrimination in "primary and secondary schools, high schools, academies, colleges and universities, extension courses and all educational institutions under the supervision of this Commonwealth. . . ."

U. S. 244, that there are times when the private role in originating officially enforced policies of discrimination will not be considered. See also *Lombard* v. *Louisiana*, 373 U. S. 267 and *Robinson* v. *Florida*, 378 U. S. 153.

Nor is it important that the private heirs of Senator Bacon joined with the members of the Board of Managers in the request for enforcement of the restriction in Bacon's will. They did so only as an afterthought, and they were represented by the same attorneys as the Board members. Thus their interests must have been identical with those of the Board members. See American Bar Association, *Canons of Professional Ethics*, No. 10.

Finally, it should be noted that the courts of Georgia refused to apply the doctrine of cy pres. Under this doctrine, which is firmly established in Georgia as a means of effectuating a testator's charitable intent, see Ga. Code Ann. §108-202; *Creech* v. *Scottish Rite Hosp. for Crippled Children*, 211 Ga. 195, 84 S. E. 2d 563 (1954), the Superior Court could have ensured the maintenance of a public park, permitted white persons to continue using it, and retained City administration by refusing to appoint new trustees. Instead it chose the course which would permit racial discrimination. Compare *Guillory* v. *Administrators of Tulane University*, 212 F. Supp. 674, 687 (E. D. La. 1962) (administrators under discriminatory will allowed to desegregate); *Rice University* v. *Carr*, 9 Race Rel. L. Rep. 613 (D. C. Harris County, Tex. 1964), appeal dismissed, No. 14,472, Tex. Ct. Civ. App., February 4, 1965 (same).

II.

The State of Georgia and the City of Macon Are So Involved in the Operation of Baconsfield as to Invalidate Under the Fourteenth Amendment Any Enforcement of the Racially Discriminatory Terms of Senator Bacon's Will.

As this Court held in *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 722, discrimination by private entities is invalid under the Fourteenth Amendment if "to some significant extent the State in any of its manifestations has been found to have become involved in it." In *Burton* and in *Turner* v. *City of Memphis*, 369 U. S. 350, this reasoning was held to justify injunctive relief against the institutions practicing discrimination. In *Peterson* v. *City of Greenville*, 373 U. S. 244, the same reasoning was applied to invalidate criminal trespass convictions, where a local ordinance required discrimination by private restaurateurs. See also *Lombard* v. *Louisiana*, 373 U. S. 267; *Robinson* v. *Florida*, 378 U. S. 153. It is submitted that the involvement of the State of Georgia and the City of Macon in the operation of Baconsfield invalidates the result reached in this case.

One factor meriting serious consideration under this heading is the fact that racial discrimination has been enforced by each department of government, as pointed out in the previous argument. Another factor of significance is the continuous ownership and operation of Baconsfield on a discriminatory basis for a substantial length of time. It is settled under the first *Girard College Case* that continued operation by municipal authorities would make further exclusion of Negroes impossible. The question now presented is whether it is possible to wipe away the effects of city administration merely by appointing new trustees.

According to Bacon's will, the Board of Managers was given "complete and unrestricted control and management of the said property with power to make all needful regulations for the preservation and improvement of the same . . . " (R. 31). Bacon provided funds for

> the management, improvement and preservation of said property, including when possible drives and walks, casinos and parlors for women, playgrounds for girls and boys and pleasure devices and conveniences and grounds for children, flower yards and other ornamental arrangements . . . (R. 32).

He expressed the hope that the Board of Managers would preserve his two houses (R. 33) and "the present woods and trees" on the property (R. 34). In the years of their administration the City and the Board of Managers have exercised the discretion granted them. They have decided what types of facilities to provide, what buildings to preserve and for what purposes, and whether to alter the landscape. The City was in control during the years when Baconsfield took shape as an institution open to the public. The effects of its administration remain.

A fact of critical importance in this case is the State of Georgia's responsibility for the original restriction of Baconsfield to a distinct racial group. Section 69-504 of the Georgia Code, enacted in 1905, well before Bacon published his carefully drafted will, provides:

> Any person may, by appropriate conveyance, devise, give, or grant to any municipal corporation of this State, in fee simple or in trust, or to other persons as trustees, lands by said conveyance dedicated in perpetuity to the public use as a park, pleasure ground, or for other public purpose, and in said conveyance, by appropriate limitations and conditions, provide that the

> use of said park, pleasure ground, or other property so conveyed to said municipality shall be limited to the white race only, or to white women and children only, or to the colored race only, or to colored women and children only, or to any other race, or to the women and children of any other race only, that may be designated by said devisor or grantor; and any person may also, by such conveyance, devise, give, or grant in perpetuity to such corporations or persons other property, real or personal, for the development, improvement, and maintenance of said property.

Many choices were offered to donors. Lands could be dedicated to the exclusive use of the white race, the colored race, or any other race, or the women and children of the white race, the colored race, or any other race. But no choice was offered for those who might have preferred to endow an integrated park.

The Supreme Court of Georgia held in this case that §69-504 did not require that gifts be limited racially (R. 142), but no such construction was in existence to guide testators and their attorneys in 1911 when Bacon wrote his will. Men are careful to conform to the letter of the law when preparing their wills. This statute was passed during the time when segregation laws were sweeping the South, see Woodward, *The Strange Career of Jim Crow*, Ch. II (1957), and its words revealed a separatist intent. The unhappy fate of pre-Civil War testamentary trusts for the emancipation or resettlement of slaves stood as a warning to any who might depart from the explicit directions of the statute. See *Adams* v. *Bass*, 18 Ga. 130 (1855); *American Colonization Society* v. *Gartrell*, 23 Ga. 448 (1858).

The rule of *Peterson* v. *City of Greenville*, 373 U. S. 244 and *Robinson* v. *Florida*, 378 U. S. 153 applies. The State

of Georgia suggested that Senator Bacon limit his gift to one of several racial classes, and he did so, following the words of the statute very closely (R. 30). In these circumstances, Senator Bacon's personal motives—explicitly set forth at some length in his will (R. 32-33)—are of no consequence; "a palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminators." *Peterson* v. *City of Greenville*, 373 U. S. 244, 248. Georgia expressly authorized racial restrictions in §69-504 and, in a companion statute, §69-505, offered enforcement of them through the police power.[11] See *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715, 726 (Stewart, J., concurring).

Reinforcing these statutes, the law of Georgia has for many years conditioned tax exemption on the existence of segregation. At least since 1877, the Constitution has authorized exemption from taxation for "all institutions of purely public charity." Ga. Const. 1877, art. 7, sec. 2, par. 1, Ga. Code Ann. §2-5002. In 1918 an amendment to the Constitution included a proviso that "all endowments to institutions established for white people, shall be limited to white people, and all endowments to institutions established for colored people, shall be limited to colored people; . . ." Editorial note, Ga. Const. 1877, art. 7, sec. 2, par. 1, Ga.

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[11] Ga. Code Ann. §69-505 provides:

Municipality authorized to accept.—Any municipal corporation, or other persons natural or artificial, as trustees, to whom such devise, gift, or grant is made, may accept the same in behalf of and for the benefit of the class of persons named in the conveyance, and for their exclusive use and enjoyment; with the right to the municipality or trustees to improve, embellish, and ornament the land so granted as a public park, or for other public use as herein specified, and every municipal corporation to which such conveyance shall be made shall have power, by appropriate police provision, to protect the class of persons for whose benefit the devise or grant is made, in the exclusive used and enjoyment thereof.

Code Ann. §2-5002. This exemption and proviso were carried over into the statute setting forth tax exemptions, Ga. Code Ann. §92-201, and readopted in the Georgia Constitution of 1945, art. 7, sec. 1, par. 4, Ga. Code Ann. §2-5404.[12]

Tax exemption is always a valuable subsidy, and "may attain significance when viewed in combination with other attendant state involvements." *Eaton* v. *Grubbs*, 329 F. 2d 710 (4th Cir. 1964). Senator Bacon was eager to obtain tax exemption for Baconsfield, providing in his will that a special statute should be sought if tax exemption should be denied (R. 32). In Georgia tax exemption is dependent upon the erection of racial barriers.

The Baconsfield trust, created pursuant to Ga. Code Ann. §69-504, is but one of several types of charitable trusts to which the State extends support in numerous ways in addition to tax exemption. See Ga. Code Ann. §108-203. The courts of Georgia have often remarked that charitable trusts are looked upon with special favor. See, e.g., *Simpson* v. *Anderson*, 220 Ga. 155, 137 S. E. 2d 638 (1964); *Goree* v. *Georgia Industrial Home*, 187 Ga. 368, 200 S. E. 684 (1938) and cases cited; *Beckwith* v. *Rector, etc., of St. Philip's Parish*, 69 Ga. 564 (1882). The statutes of Georgia reflect this solicitude, providing for the enforcement of charitable trusts in equity, Ga. Code Ann. §108-201, the effectuation of the testator's intent under the cy pres

[12] In *Emory University* v. *Nash*, 218 Ga. 317, 127 S. E. 2d 798 (1962), the Supreme Court of Georgia held that the proviso on racial limitation could not be applied to deprive a desegregated university of its tax exemption because the racial proviso was inconsistent with another proviso stipulating that tax exemption should only apply to "such colleges, incorporated academies or other seminaries of learning as are open to the general public," Ga. Code Ann. §92-201. However, because there is no conflicting statute requiring that tax exempt parks be open to the general public, Georgia's law continues to condition tax exemption of parks on the maintenance of racial limitations.

doctrine, §108-202, and continuous supervision by equity courts, §108-204. Particular favoritism is extended to charitable trusts in §§108-206 through 108-209, which lay down rules of procedure and construction directed toward upholding the validity of attempted charitable trusts. Charitable, or public, trusts are enforced in the courts by the Attorney General or the solicitor general of the circuit in which the trust corpus lies. Ga. Code Ann. §108-212 (1963 Supp.).

One of the many ways the State of Georgia supports charitable trusts is by extending them immunity from suit in certain tort situations. Under the present rule, an institution's charitable assets cannot be recovered by a person claiming negligence of the institution's employees. *Morehouse College* v. *Russell,* 219 Ga. 717, 135 S. E. 2d 432 (1964); *id.,* 109 Ga. App. 301, 136 S. E. 2d 179 (1964); *Cox* v. *De Jarnette,* 104 Ga. App. 664, 123 S. E. 2d 16 (1961); *Morton* v. *Savannah Hospital,* 148 Ga. 438, 96 S. E. 887 (1918). Noncharitable assets, such as money received for services or a liability insurance policy, can be recovered by one suing under *respondeat superior,* and all assets are subject to recovery for administrative negligence, or the torts of the institution as opposed to its employees. *Ibid.* Nonetheless, Georgia continues to offer charitable enterprises a substantial degree of immunity from suit, with very little doctrinal change having occurred in the last fifty years. See *Morton* v. *Savannah Hospital, supra.*

Georgia has a comparable doctrine of immunity from suit for municipalities where a governmental function is being performed. Ga. Code Ann. §69-301. It has been held that maintaining a park is a governmental function, so that the municipality is immune from liability for the acts of its officers or employees in connection with the park. *Stubbs* v. *City of Macon,* 78 Ga. App. 237, 50 S. E. 2d 866 (1948);

Jones v. *City of Atlanta*, 35 App. 376, 133 S. E. 521 (Ga. Ct. App. 1926).

Another incident of charitable trusts in Georgia, illustrating the support offered them by the state and their similarity to governmentally owned and operated institutions, is perpetual existence. Georgia retains in its law of private, or noncharitable, trusts, the traditional rule against perpetuities limiting their duration to "lives in being . . . , and 21 years, and the usual period of gestation added thereafter." Ga. Code Ann. §85-707. However, the rule against perpetuities does not apply to charitable trusts. *Regents of University System* v. *Trust Company of Georgia*, 186 Ga. 498, 512, 198 S. E. 345 (1938); *Murphy* v. *Johnston*, 190 Ga. 23 (7), 8 S. E. 2d 23 (1940); *Pace* v. *Dukes*, 205 Ga. 835, 55 S. E. 2d 367 (1949). In the case of Baconsfield, perpetual existence is guaranteed by §69-504.

This element of perpetual existence is a factor of major significance. It is axiomatic that a man has a right to exercise his prejudices in the use of his private property during his life, and to dispose of his property by will, making irrational choices about its recipients and uses. But no man has the right to control his property through eternity. The law sets temporal limits on testamentary encumbrances, and in the exceptional situation of the charitable trust it exercises close supervision. In this case Georgia has not only given Bacon's trust perpetual existence, but has exercised its broad powers to assure the maintenance of segregation to the end of time.

It has been shown that charitable trusts—whether the trustees be public or private—are carefully nurtured by the State of Georgia, as by other states. The reason the state fosters these institutions to such a degree lies in the fact that charitable trusts perform many functions often

performed by the state. See Clark, *Charitable Trusts, the Fourteenth Amendment, and the Will of Stephen Girard,* 66 Yale L. J. 979, 1010 (1957). As an example, Baconsfield, established under a charitable trust, serves as a public recreational facility for some of the citizens of Macon. The provision of recreational facilities is a public function under the laws of Georgia. Ga. Code Ann. §§69-601 through 69-616 authorizes municipalities to set aside existing public property or acquire new property for use as parks, playground and recreation centers.

Thus Baconsfield was set up under one of several governmentally developed methods of providing public parks. The Constitution forbids racial restrictions in public facilities established by government; it would be anomalous if public parks set up under other, equally effective, governmentally fostered plans could be so restricted. In analogous situations, the Fourth Circuit has held that medical facilities operated by private groups under comprehensive state plans to provide health facilities for all citizens are subject to the nondiscrimination requirements of the Fourteenth Amendment. *Simkins* v. *Moses H. Cone Memorial Hospital,* 323 F. 2d 929 (4th Cir. 1963), cert. denied, 376 U. S. 938; *Eaton* v. *Grubbs,* 329 F. 2d 710 (4th Cir. 1964). Cf. *Smith* v. *Allwright,* 321 U. S. 649, *Terry* v. *Adams,* 345 U. S. 461.

Indeed, this Court's decision in *Marsh* v. *Alabama,* 326 U. S. 501 requires the desegregation of Baconsfield. Since the company town in *Marsh* was like any other town in all respects except ownership, the commands of the Fourteenth Amendment were held to be applicable. Apart from its previous ownership, Baconsfield is no different from any other public park.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be granted.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
FRANK H. HEFFRON
10 Columbus Circle
New York, New York 10019

DONALD L. HOLLOWELL
WILLIAM H. ALEXANDER
HOWARD MOORE, JR.
859½ Hunter Street, N. W.
Atlanta, Georgia 30314

Attorneys for Petitioners

APPENDIX

Opinion of Supreme Court of Georgia

IN THE SUPREME COURT OF GEORGIA
22534

Decided Sept. 28, 1964

209

EVANS *et al.* v. NEWTON *et al.*

The record does not support the contentions of the plaintiffs in error, and the judge could not properly have gone beyond the judgment rendered. The judgment is not shown to be erroneous for any of the reasons urged by counsel for the plaintiffs in error.

The will of A. O. Bacon (which was probated in solemn form) in Item Nine gave in trust described property, to be known as "Baconsfield", to named trustees for the benefit of his wife and two named daughters for their joint use, benefit, and enjoyment during the term of their natural lives. It was provided that upon the death of the last survivor, the property, including all remainders and reversions, "shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust for the sole, perpetual and unending, use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon to be by them forever used and enjoyed as a park and pleasure ground, subject to the restrictions, government, management, rules and control" of a board of managers consisting of seven persons, not less than four to be white women and all seven to be white persons. In order to provide for the maintenance of the park, income from described real property and bonds was to be expended by the board of managers.

Opinion of Supreme Court of Georgia

Charles E. Newton and others, as members of the Board of Managers of Baconsfield, brought an equitable petition against the City of Macon (in its capacity as trustee under Item Nine of the will of A. O. Bacon), and Guyton G. Abney and others, as successor trustees under the will holding assets for the benefit of certain residuary beneficiaries. It was alleged: The city as trustee holds the legal title to a tract of land in Macon, Bibb County, known as Baconsfield, under Item Nine of the will of A. O. Bacon. As directed in the will, the board through the years has confined the exclusive use of Baconsfield to those persons designated in the will. The city is now failing and refusing to enforce the provisions of the will with respect to the exclusive use of Baconsfield. Such conduct on the part of the city constitutes such a violation of trust as to require its removal as trustee. It was prayed that: the city be removed as a trustee under the will; the court enter a decree appointing one or more freeholders, residents of the city, to serve as trustee or trustees under the will; legal title to Baconsfield and any other assets held by the city as trustee be decreed to be in the trustee or trustees so appointed for the uses originally declared by the testator; and for further relief.

The City of Macon filed its answer asserting that it cannot legally enforce racial segregation of the property known as Baconsfield, and therefore it is unable to comply with the specific intention of the testator with regard to maintaining the property for the exclusive use, benefit, and enjoyment of the white women, white girls, white boys, and white children of the city. The city prayed that the court construe the will and enter a decree setting forth the duties and obligations of the city in the premises. The other defendants admitted the allegations of the petition and

prayed that the city be removed as a trustee. The petitioners thereafter filed a motion for summary judgment.

Reverend E. S. Evans and others, alleging themselves to be Negro residents of the City of Macon, on behalf of themselves and other Negroes similarly situated, filed an intervention in the cause and asserted: The restriction and limitation reserving the use and enjoyment of Baconsfield Park to "white women, white girls, white boys and white children of the City of Macon," is violative of the public policy of the United States of America and violative of the Constitution and laws of the State of Georgia. The court as an agency of the State of Georgia cannot, consistently with the equal protection clause of the Fourteenth Amendment of the Constitution of the United States and the equivalent provision of the Constitution of the State of Georgia, enter an order appointing private citizens as trustees for the manifest purpose of operating, managing, and regulating public property (which passed to the City of Macon under a charitable trust created by will) in a racially discriminatory manner. Although the charitable devise at the time of its creation was capable of being executed in the exact manner provided by the will, by operation of law it is no longer capable of further execution in the exact manner provided for by the testator. The court should effectuate the general charitable purpose of the testator to establish and endow a public park by refusing to appoint private persons as trustees.

By amendment to the petition it was alleged: By the will of A. O. Bacon a trust was established for his heirs. The trust has been executed as to four of his seven heirs now living, A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks, and M. Garten Sparks. The interests of three remaining heirs, Louise Curry Williams, Shirley

Curry Cheatham, and Manley Lamar Curry, are still held under an executed trust by four trustees holding under the authority of the will, these trustees being Guyton Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee. These seven persons have an interest in the litigation since, if the trust purpose expressed in the will with respect to the designation of persons who may use Baconsfield should fail, the property comprising Baconsfield, together with the property providing the upkeep of Baconsfield, will revert to the estate of A. O. Bacon and be distributed to these heirs. The amendment prayed that the Sparks heirs be allowed to intervene and that the trustees be allowed to assert the interests of the other heirs. It was also prayed that the Negro intervenors and other members of the Negro race resident in Macon be permanently enjoined from entering and using the facilities of Baconsfield. The Sparks heirs and the trustees of the other heirs of A. O. Bacon filed an intervention praying that the relief sought by the original petitioners be granted, but that if such relief not be granted, the property revert to them.

The City of Macon filed an amendment to its answer, alleging that pursuant to resolution adopted by the Mayor and Council of the city at its regular meeting on February 4, 1964, the city has resigned as trustee under the will of A. O. Bacon. It prayed that the resignation be accepted by the court.

The Negro intervenors filed an amendment to their intervention in which they asserted: The equal protection clause of the Fourteenth Amendment to the United States Constitution prohibits the court from enjoining Negroes from the use of the park, and from accepting the resignation of the City of Macon as trustee and apointing new trustees for the purpose of enjoining (enforcing?) the racially dis-

criminatory provision in the will of A. O. Bacon. Code § 69-504 prescribes racial discrimination and is therefore violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Since the racially discriminatory provision in the will was dictated by that unconstitutional statute, enforcement of the racially discriminatory provision is constitutionally prohibited. Code § 108-202, properly construed, requires that the racially discriminatory provision in the will be declared null and void. The intervenors prayed that the court withhold approval of the attempted resignation of the city as trustee under the will, direct the city to continue to administer the park on a racially nondiscriminatory basis, and deny the injunction sought by the petitioners to exclude Negroes from the use of the park.

On March 10, 1964, the judge of the superior court entered an order and decree in the case which adjudged as follows: (1) The intervenors named are proper parties in the case and are proper representatives of the class which their intervention states that they represent, the Negro citizens of Bibb County and the City of Macon. (2) The defendants, Guyton G. Abney, J. D. Crump, T. I. Denmark, and Dr. W. G. Lee, as successor trustees under the will of A. O. Bacon, and intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks are also proper parties. (3) The City of Macon having submitted its resignation as the trustee of the property known as Baconsfield, the resignation is accepted by the court. (4) Hugh M. Comer, Lawton Miller, and B. L. Ragister are appointed as trustees to serve in lieu of the City of Macon. (5) The court retains jurisdiction for the purpose of appointing other trustees that may be necessary in the future. (6) It is unnecessary to pass upon the

secondary contention of the intervenors Guyton G. Abney and others.

Reverend E. S. Evans and others in their writ of error to this court assign error on this order of the trial judge. Their contentions will appear from the opinion.

ALMAND, Justice. Counsel for the plaintiffs in error (the Negro intervenors) assert that the decree of the judge of the superior court was "patent enforcement of racial discrimination contrary to the equal protection clause of the Fourteenth Amendment" to the Federal Constitution. The decree did not enforce, or purport to enforce, any judgment, ruling, or decree as related to the intervenors. After determining that all parties were properly before the court, the decree did two things: (1) Accepted the resignation of the City of Macon as trustee of Baconsfield, and (2) appointed new trustees.

"The law of charities is fully adopted in Georgia . . ." Jones v. Habersham, 107 U. S. 174(5). Under the law of this State any person may, by will, grant, gift, deed, or other instrument, give or devise property for any charitable purpose. Ga. L. 1937, p. 593 (Code Ann. 108-207). Any public convenience might be a proper subject for a charitable trust. Code 108-203. A charity once established is always subject to supervision and direction by a court of equity to render effectual its purpose. Code 108-204. It is the rule that a charitable trust shall never fail for the want of a trustee. Code 108-302.

Whether the will of A. O. Bacon, establishing a trust for the operation of Baconsfield, contemplated by the language "to the Mayor and Council of the City of Macon and *to their* successors [italics ours]" that the named trustee might resign, need not be determined. The City of Macon did resign, and the judge of the superior court was con-

fronted with the commandment of Code 108-302 that a trust shall never fail for the want of a trustee. Being empowered to appoint trustees when a vacancy occurs for any cause (Thompson v. Hale, 123 Ga. 305, 51 S E 383; Harris v. Brown, 124 Ga. 310(2), 52 S E 610; Woodbery v. Atlas Realty Co., 148 Ga. 712, 98 S E 472; Sparks v. Ridley, 150 Ga. 210(3), 103 S E 425), the judge exercised such power and appointed successor trustees.

The contention by counsel for the plaintiffs in error that Code 69-504 required A. O. Bacon to limit the use of Baconsfield to the members of one race cannot be sustained. Code 69-504, in providing for gifts limited to members of a race, simply states that any person *may* "devise, give, etc." The law of Georgia does not by Code 69-504, nor by any other statutory provision, require that any testator shall limit his beneficence to any particular race, class, color, or creed. Such limitation, however, standing alone, is not invalid, and this Court has sustained a testamentary charity naming trustees for establishing and maintaining "a home for indigent colored people 60 years of age or older residing in Augusta, Georgia." Strother v. Kennedy, 218 Ga. 180 (127 SE2d 19). A. O. Bacon had the absolute right to give and bequeath property to a limited class.

Counsel for the plaintiffs in error assert that: "As the City was unable to comply with the racially discriminatory direction of the trust, three alternatives were open to the lower court: (1) declare the racially discriminatory provision null and void; (2) remove the trustee (or accept its resignation) and appoint a non-governmental trustee; (3) declare failure of the trust." They insist that the judge should have chosen the first alternative.

Counsel for plaintiffs in error assert that the court should have applied the provisions of Code 108-202 that

when a valid charitable bequest is incapable for some reason of exact execution in the exact manner provided by the testator a court of equity will carry it into effect in such way as nearly as possible to effectuate his intention. The answer to this contention is: the application of the cy pres rule, as provided in this code section, was not invoked by the primary parties to this case, and even if it be conceded (which we do not concede, see Smith v. Manning, 153 Ga. 209, 116 S E 813 and Fountain v. Bryan, 176 Ga. 31, 166 S E 766) that the intervenors could raise such issue, the facts before the trial judge were wholly insufficient to invoke a ruling that the charitable bequest was or was not incapable for some reason of exact execution in the exact manner provided by the testator. There is no testimony in the record of any nature or character that the board of managers provided by the will cannot operate the park pursuant to the terms and conditions of the will.

Counsel for the plaintiffs in error cite Pennsylvania v. Board of Directors of City Trust of the City of Philadelphia, 353 U. S. 230. In the Pennsylvania case the United States Supreme Court pointed out that the board which operated Girard College was an agency of the State of Pennsylvania by legislative act, and that the refusal to admit Negroes to Girard College was therefore discrimination by the State. Upon the return of the case to the Supreme Court of Pennsylvania for further proceedings not inconsistent with the opinion, that court remanded the case to the Orphans' Court for further proceedings not inconsistent with the opinion of the Supreme Court of the United States. The Supreme Court of Pennsylvania, on the second appearance of the case (see Girard College Trusteeship, 391 Pa. 434), stated that the Orphans' Court construed the United States Supreme Court's opinion to mean

that the Board of City Trusts was constitutionally incapable of administering Girard College in accordance with the testamentary requirements of the founder, and the Orphans' Court entered a decree removing the Board as trustee of Girard College and substituting therefor thirteen private citizens, none of whom held any public office or otherwise exercised any governmental power under the Commonwealth of Pennsylvania. The Supreme Court of Pennsylvania affirmed this action on review, and again sustained action denying admission to Girard College by the Negro applicants. Counsel for the defendants in error cite Girard College Trusteeship, 391 Pa. 434, and strongly rely on this Pennsylvania case. (On review by the United States Supreme Court the motion to dismiss was granted, and treating the record as a petition for certiorari, certiorari was denied. Pennsylvania v. Board of Directors of City Trust of Pennsylvania, 357 U. S. 570. A motion for rehearing was denied. 358 U. S. 858.) In so far as the Girard College Trusteeship case is applicable on its facts to the present case, it supports the rulings we have made.

The record does not sustain the contentions of the plaintiffs in error, and the judge could not properly have gone beyond the judgment rendered. This judgment is not shown to be erroneous for any of the reasons urged by counsel for the plaintiffs in error.

Judgment affirmed. All the Justices concur.

Judgment of Supreme Court of Georgia

SUPREME COURT OF GEORGIA

Atlanta, September 28, 1964

The Honorable Supreme Court met pursuant to adjournment. The following judgment was rendered:

E. S. Evans et al. v. Charles E. Newton et al.

This case came before this court upon a writ of error from the Superior Court of Bibb County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. All the Justices concur.

Order of Supreme Court of Georgia Denying Rehearing

SUPREME COURT OF GEORGIA

Atlanta, October 8, 1964

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

E. S. Evans et al. v. Charles E. Newton et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

Letter Opinion of Superior Court of Bibb County

STATE OF GEORGIA
SUPERIOR COURTS OF THE MACON JUDICIAL CIRCUIT
MACON, GEORGIA

Chambers of:

OSCAR L. LONG
HAL BELL
W. D. AULTMAN
Judges

March 10, 1964

Bibb, Crawford
Peach and Houston
Counties

MR. A. O. B. SPARKS, JR.
JONES, SPARKS, BENTON & CORK
Attorneys at Law
Persons Building
Macon. Georgia

MR. TRAMMELL F. SHI
Attorney at Law
Southern United Building
Macon, Georgia

MR. DONALD L. HOLLOWELL
Attorney at Law
859½ Hunter Street, N. W.
Atlanta, Georgia

Re: Charles E. Newton, et al. v.
The City of Macon, et al.,
No. 25864, Bibb Superior Court.

Gentlemen:

After careful consideration of the Motion for Summary Judgment in the above stated case, I have reached the following conclusions.

Letter Opinion of Superior Court of Bibb County

The racial limitation in Senator A. O. Bacon's will is not unlawful for any reason as contended by the intervenors, Reverend E. S. Evans, et al.

The inability of the City of Macon, as Trustee, to apply constitutionally the racial criterion prescribed by the testator for use of the property as a park for white women and white children affected the trustee and not the trust, and the City having tendered its resignation as trustee, it is proper that the Court accept the resignation and appoint private trustees who can carry out the purpose and intent of the testator as set forth in the will.

It is my opinion that the doctrine of Cy Pres cannot be applied to Baconsfield. There is no general charitable purpose expressed in the will. It is clear that the testator sought to benefit a certain group of people, i.e., "the white women, white girls, white boys and white children of the City of Macon", and it is clear that he sought to benefit them only in a certain way, i.e., by providing them with a park or playground. Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield.

The Court has, therefore, this day signed and filed with the Clerk of this Court an order and decree, a copy of which is herewith enclosed.

Yours truly,

/s/ O. L. Long

OLL:ese

CC: Mr. Romas Ed Raley, *Clerk*
Bibb Superior Court
Macon, Georgia

Order of Superior Court of Bibb County

No. 25864

Bibb Superior Court

Bill in Equity

Charles E. Newton, *et al.*

v.

City of Macon, *et al.*

Order and Decree

The Motion for Summary Judgment filed in behalf of petitioners in the above captioned matter having come on regularly to be heard, and the Court having duly considered all pleadings filed in behalf of all parties to said cause and the briefs filed in behalf of petitioners and the intervenors Rev. E. S. Evans, Louis H. Wynne, Rev. J. L. Key, Rev. Booker W. Chambers, William Randall, and Rev. Van J. Malone, it is

Considered, ordered and adjudged as follows:

(1) The intervenors named above are proper parties to this case and are proper representatives of the class which their intervention states they represent, to-wit, the negro citizens of Bibb County, Georgia, and the City of Macon, Georgia.

(2) The defendants Guyton G. Abney, J. D. Crump, T. I. Denmark and Dr. W. G. Lee, as successor Trustees under the Last Will and Testament of Augustus Octavius Bacon, deceased, are also proper parties to the case, as are the

intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks.

(3) The defendant the City of Macon having submitted its resignation as Trustee of the property described in the petition and known as Baconsfield, said resignation is hereby accepted by the Court.

(4) Under the principle that a trust shall not fail for want of a trustee it becomes the duty of this Court to appoint new trustees to serve in lieu of the City of Macon; and the following, all being citizens and residents of Bibb County, Georgia, are hereby appointed as Trustees, to-wit, Hugh M. Comer, Lawton Miller and B. L. Register.

(5) The Court hereby retains jurisdiction for the purpose of appointing another trustee or trustees in the event any of the persons named above fails to accept his appointment or in the event of the future death, incompetency or other cause whereby any or all of such Trustees fail or cease to act as such.

(6) Since the relief herein granted is also that primarily sought by the defendants Guyton G. Abney, et al., as Trustees under the Last Will and Testament of Augustus Octavius Bacon and by intervenors A. O. B. Sparks, Willis B. Sparks, Jr., Virginia Lamar Sparks and M. Garten Sparks, it is therefore unnecessary to pass upon and the Court does not pass upon the secondary contentions outlined in paragraph 5 of the amendment to the answer and cross bill filed by Guyton G. Abney, et al., as Trustees and in paragraph 6 of the petition for intervention filed by the above named intervening heirs.

So ordered, this the 10th day of March, 1964.

/s/ O. L. Long
J.S.C.M.C.